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IN THE

Supreme Court of the United States

October Term, 1996

SOUTHWEST AIRLINES CO.,

Petitioner

v.

PATRICK FENNESSY,

Respondent.

On Petition for Writ of Certiorari from the
United States Court of Appeals for the Ninth Circuit

PETITIONER'S REPLY BRIEF

Of Counsel:

WELLS PINCKNEY & MCHUGH
A Professional Corporation
800 One Alamo Center
106 S. St. Mary's St.
San Antonio, TX 78205

J. JOE HARRIS
800 One Alamo Center
106 S. St. Mary's St.
San Antonio, TX 78205
Telephone: (210) 226-1166
Telecopier: (210) 226-1133

Attorney for Petitioner

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Preliminary Statement

In his brief in opposition, Fennessy argues that the issue presented for review may not be considered by this Court, because Southwest "never made this argument to the Ninth Circuit." (Brief in Opposition, p. 1.)

The question presented for review in Southwest's original petition is: "Whether a Railway Labor Act system board of adjustment has exclusive initial jurisdiction of an employee's claim of wrongful discharge in violation of section 152, Fourth of the RLA." (Petition, p. i.)

Issue Presented for Review Was Decided by the Ninth Circuit

In its opinion, the Ninth Circuit resolved two issues contrary to Southwest's position: (1) Fennessy's statutory claim is not a "minor" dispute within the exclusive jurisdiction of the system board of adjustment. (2) Fennessy has a private right of action to enforce his RLA claim directly in federal court without submitting it to the system board of adjustment. (App. 1.5-1.11.)

Clearly, the Ninth Circuit passed on the issue presented for review in this Court, *i.e.* did the system board of adjustment have exclusive initial jurisdiction[1] of Fennessy's statutory claim? It is not necessary that the issue be framed precisely as it was in the court below. "A litigant seeking review in this Court of a claim properly raised in the lower courts thus generally possesses the ability to frame the question to be decided in any way he chooses, without being limited to the manner in which the question was framed

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[1] The term "initial" is used in recognition of the fact that the district court has jurisdiction to review the system board decision under a variety of circumstances. For example, judicial review is available under the statute, 45 U.S.C. § 153, First (q). By way of further example, judicial review is also available where there has been a material breach of the duty of fair representation. *Hines v. Anchor Motor Freight, Inc.*, 424 U.S. 554, 96 S. Ct. 1048 (1976). Of course, "initial" jurisdiction in federal court may be premised upon a material breach of the duty of fair representation. *Glover v. St. Louis-San Francisco Ry.*, 393 U.S. 324, 89 S. Ct. 548 (1969). In this latter instance, however, initial jurisdiction will lie in federal court because the board of adjustment is without jurisdiction to entertain a dispute between an employee and his union. *Id.*, 393 U.S. at 328-29, 89 S. Ct. 550-51. *See also Conley v. Gibson*, 355 U.S. 41, 44, 78 S. Ct. 99, 101 (1957). In such a circumstance, the employer may be "made a party to insure complete and meaningful relief . . . ." *Glover*, 393 U.S. at 329, 89 S. Ct. at 551.

below." *Yee v. City of Escondido*, 503 U.S. 519, ___, 112 S. Ct. 1522, 1532 (1992). "It suffices for our purposes that the court below passed on the issue presented, particularly where the issue is, we believe, 'in a state of evolving definition and uncertainty,' and one of importance to the administration of federal law." *Virginia Bankshares, Inc. v. Sandberg*, 501 U.S. 1083, 1099 n.8, 111 S. Ct. 2749, 2761 n.8 (1991) (citations omitted).

New Argument

Southwest concedes that it is making a new argument in this Court in support of its consistent position that Fennessy's statutory claim should have been submitted in the first instance to the system board of adjustment. More particularly, Southwest argues for the first time in this Court that when determining whether a statutory claim should be submitted to an arbitral tribunal, the statutory right should be carefully examined to determine whether "Congress itself has evinced an intention to preclude a waiver of judicial remedies for the statutory rights at issue." *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628, 105 S. Ct. 3346, 3354-55 (1985). While conducting this analysis, the Court should bear in mind that "questions of arbitrability must be addressed with a healthy regard for the federal policy favoring arbitration." *Moses H. Cone Mem. Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24, 103 S. Ct. 927, 941 (1983). The burden should be on Fennessy "to show that Congress intended to preclude a waiver of a judicial forum" for his statutory claim. *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 26, 111 S. Ct. 1647, 1652 (1991). By requiring Fennessy to first submit his statutory claim to the adjustment board, he "does not forego the substantive rights afforded by the statute; [he] only submits to their resolution in an arbitral, rather than a

judicial forum." *Mitsubishi*, 473 U.S. at 628, 105 S. Ct. at 3354.

This new argument may be properly considered by the Court. For where the underlying issue has been decided by the court of appeals, a party is not limited to the precise arguments it may have made below. "Our traditional rule is that '[o]nce a federal claim is properly presented, a party can make any argument in support of that claim; parties are not limited to the precise arguments they made below.'" *Lebron v. National R.R. Passenger Corp.*, 513 U.S. 374, ___, 115 S. Ct. 961, 965 (1995), quoting *Yee*, 112 S. Ct. at 1532. *See also Dewey v. Des Moines*, 173 U.S. 193, 198, 19 S. Ct. 379, 380 (1899).

To reiterate, Southwest's argument that Fennessy's statutory claim should be analyzed under the *Mitsubishi/Moses H. Cone/Gilmer* paradigm is not a new claim. Rather, it is simply a new argument to support what has been Southwest's consistent position throughout, *i.e.* Fennessy's statutory claim should have been initially submitted to the statutory/contractual system board of adjustment.

Conclusion

The Ninth Circuit decided (1) that Fennessy's claim was not a "minor" dispute within the exclusive jurisdiction of the system board of adjustment; and (2) that Fennessy could bypass the adjustment board because he had a private right of action which he could bring directly in federal court. It is obvious that the Ninth Circuit ruled on the issue presented for review in this Court, *i.e.* did the adjustment board have exclusive initial jurisdiction of Fennessy's statutory claim? Southwest's new argument to this Court

that analysis of the issue should include the principles enunciated in *Mitsubishi*, *Moses H. Cone* and *Gilmer* is *not* a new claim. Rather, it is merely "a new argument to support what has been [Southwest's] consistent claim." *Lebron*, 115 S. Ct. at 965.

Respectfully submitted,

Of Counsel:

WELLS PINCKNEY & MCHUGH
A Professional Corporation
800 One Alamo Center
106 S. St. Mary's St.
San Antonio, TX 78205

J. JOE HARRIS
800 One Alamo Center
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Attorney for Petitioner

AEEJA410